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Carole Migden, Friends of Carole Migden
Committee, and Re-Elect Senator Carole
Migden Committee

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CAROLE MIGDEN, FRIENDS OF CAROLE
MIGDEN COMMITTEE, and RE-ELECT
SENATOR CAROLE MIGDEN COMMITTEE

Plaintiffs,

vs.

CALIFORNIA FAIR POLITICAL PRACTICES
COMMISSION; ROSS JOHNSON, in his official
capacity as Chairman of the California Fair
Political Practices Commission; and TIMOTHY A.
HODSON, A. EUGENE HUGUENIN, JR.,
ROBERT LEIDIGH and RAY REMY in their
official capacities as members of the California
Fair Political Practices Commission,

Defendants.

No.: _____

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

INTRODUCTION

State Senator Carole Migden, up for re-election to a second term in office, is facing a hotly contested primary election in June against three well-known challengers. Whoever wins the primary in the heavily-democratic 3rd Senate District is likely to win the general election in November, making this June the critical battleground. Senator Migden has \$647,000 in campaign funds from previous elections that remain unspent. The campaign mailings and other advertising that could be paid for with the \$647,000 could well make the difference in the June primary election.

Over 30 years ago, the U.S. Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), held that the expenditure of campaign funds involves core political speech activity protected by the First Amendment. Any restrictions on such expenditures must pass “strict scrutiny” – that is, they must be narrowly tailored to meet a compelling state interest. In the more than 30 years since *Buckley*, the courts have routinely struck down attempts to limit a candidate’s campaign expenditures. In particular, the U.S. Court of Appeals for the Ninth Circuit struck down a California statute that prevented candidates from transferring funds from their current campaign committee to another committee they had established for a future election. *Service Employees Int’l Union v. Fair Political Practices Comm’n*, 955 F.2d 1312, 1323 (9th Cir. 1992). Such “intra-candidate” transfer bans, the court ruled, operate as an expenditure limit, are not justified by any compelling state interest and are not narrowly tailored. *Id.* Following that ruling, the California Attorney General advised that the California surplus funds statute, Government Code section 89519, which prohibits candidates from transferring funds remaining in a prior campaign committee to a committee established for a future election unless they do so within an arbitrary time frame, plainly is unconstitutional. 78 Ops. Cal. Atty. Gen. 266 (1995), 1995 WL 475548.

Nonetheless, the California Fair Political Practices Commission, charged with enforcing the surplus funds statute, has told Senator Migden that she is prohibited from using any of the \$647,000 remaining from her prior campaigns on her current primary election contest because, in their view, those funds have become “surplus” within the meaning of section 89519. It has rejected Senator Migden’s claim that she complied with the statute, and her alternative request to be granted a waiver of the statute, as was granted to another state senator who admitted missing the statutory deadline. As

1 things stand, the FPPC could seek a civil penalty of up to three times the amount spent if Senator
2 Migden uses any part of that \$647,000 for her June primary campaign. Cal. Gov't Code, § 89521.

3 The surplus funds statute is unconstitutional. It operates as an expenditure limitation
4 that cannot be justified by any compelling state interest. Moreover, because it allows or disallows
5 expenditure of campaign funds based solely on whether the candidate meets an arbitrary time deadline,
6 the statute is not narrowly tailored, even if a compelling state interest were at stake.

7 In particular, the surplus funds statute is unconstitutional as applied to Senator Migden.
8 Other candidates who amassed significant sums of unspent money from prior campaigns are being
9 allowed to use those funds for current or future elections, with the FPPC's blessing. Moreover, the
10 FPPC *permitted* the one other candidate who missed the arbitrary transfer deadline to use her surplus
11 funds for a new election.

12 Attempts to resolve this matter with the FPPC have failed, leaving Senator Migden no
13 choice but to bring this action. Plaintiffs, therefore, allege as follows:

14 **JURISDICTION**

15 1. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). This action
16 is brought to prevent deprivation of plaintiffs' free speech rights pursuant to the First and Fourteenth
17 Amendments to the United States Constitution. Plaintiffs have been and are threatened with
18 deprivation of these rights by the operation of California Government Code section 89519, which
19 prohibits transfers of surplus campaign funds to another election committee of the same candidate
20 unless done so within an arbitrary time deadline.

21 **VENUE**

22 2. Venue for this action properly lies within the above-captioned judicial district
23 pursuant to 28 U.S.C. § 1391(b). Defendant CALIFORNIA FAIR POLITICAL PRACTICES
24 COMMISSION (the "FPPC") maintains its offices in and conducts official business in the City of
25 Sacramento, State of California, which is contained in this judicial district. Further, defendants'
26 decision to prohibit Senator Migden from using her surplus campaign funds for her 2008 primary
27 election occurred in the judicial district.

1 **PARTIES**

2 3. Plaintiff CAROLE MIGDEN is a resident and registered voter of San Francisco,
3 California. SENATOR MIGDEN also is an incumbent Senator of the State of California representing
4 the 3rd Senate District, which encompasses Marin County and parts of the City and County of
5 San Francisco and Sonoma County. SENATOR MIGDEN's current term of office ends in
6 December 2008. She is running for re-election and is seeking the nomination of the Democratic Party
7 in the statewide primary election scheduled for June 3, 2008. Prior to becoming a state Senator,
8 SENATOR MIGDEN served on the State Board of Equalization from 2002 through 2004, and in the
9 State Assembly from 1996 through 2002.

10 4. Plaintiff FRIENDS OF CAROLE MIGDEN (the "2004 COMMITTEE") is a
11 state candidate-controlled political committee that SENATOR MIGDEN opened in December 2000 to
12 support her first, successful campaign for State Senate in 2004. The 2004 COMMITTEE received
13 contributions and made expenditures in support of SENATOR MIGDEN's 2004 Senate campaign.
14 The 2004 COMMITTEE remains open and currently has a balance of approximately \$647,000 in
15 unspent campaign funds.

16 5. Plaintiff RE-ELECT SENATOR CAROLE MIGDEN (the "2008
17 COMMITTEE") is a state candidate-controlled political committee that SENATOR MIGDEN
18 opened in March 2005 to support her 2008 Senate re-election campaign. All contributions and
19 expenditures for SENATOR MIGDEN's re-election campaign are made to and from this committee.

20 6. Defendant CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
21 ("FPPC") is an agency established within the government of the State of California. Cal. Gov't Code
22 § 83100. The FPPC's office is located in Sacramento, California. The FPPC is responsible for the
23 implementation and administrative enforcement of the Political Reform Act of 1974, Government
24 Code sections 81000 *et seq.* ("Act" or "PRA"), and for the civil enforcement of the PRA against
25 candidates and their campaign committees. *Id.* at §§ 83111, 83115-83116, 91001(b). Under the PRA,
26 any interested person may seek judicial review of any action of the FPPC. *Id.* at § 83120. Such cases
27 "shall be advanced on the docket of the court and put ahead of other actions" if they involve an
28 upcoming election. *Id.* at § 83121.

7. Defendant ROSS JOHNSON is the Chairman of the FPPC, and defendants TIMOTHY A. HODSON, A. EUGENE HUGENIN, JR., ROBERT LEIDIGH and RAY REMY are the members of the FPPC. Defendants JOHNSON, HODSON, HUGUENIN, LEIDIGH and REMY are sued in their official capacities only.

GENERAL ALLEGATIONS

8. The PRA regulates campaign contributions to, and expenditures by, candidates for elective state office. Cal. Gov't Code §§ 81000 *et seq.* It also establishes reporting requirements for contributions and expenditures.

9. The PRA generally permits a candidate to transfer campaign funds that remain unspent after an election to another campaign committee established by that same candidate for a future election to the same or any other office. Cal. Gov't Code § 85306. Section 85306 does not set a deadline by which such “intra-candidate” transfers must occur.

10. From 1996 through 2000, during the time when SENATOR MIGDEN ran for state Assembly, the PRA did not limit the amount a person could contribute to candidates for state office. In November 2000, the voters passed Proposition 34 to, among other things, establish contribution limits for state candidate elections held on or after January 1, 2001. The proponents of Proposition 34 were well aware that the U.S. Court of Appeals for the Ninth Circuit previously had struck down as unconstitutional a California statute that prohibited candidates from carrying over funds raised prior to imposition of a contribution limit. *Service Employees Int’l Union v. Fair Political Practices Comm’n*, 955 F.2d 1312, 1323 (9th Cir. 1992). They therefore included in Proposition 34 a provision allowing candidates for state office to use funds raised prior to January 1, 2001, that were not subject to contribution limits, for future campaigns “without attributing the funds to specific contributors.” Cal. Gov’t Code § 85306(b). This meant that candidates who had on hand funds raised prior to the advent of Proposition 34’s contribution limits could use those funds in a future election without regard to the newly-imposed contribution limits, making the “pre-Proposition 34” funds, as they were called, especially valuable. After an initial period of uncertainty, the FPPC eventually decreed by regulation that there would be no limit on the number of times a candidate could transfer

1 those pre-Proposition 34 funds to another of his or her campaign committees. Cal. Code Regs., tit. 2,
2 § 18530.2(a).

3 11. While Proposition 34 thus allows candidates to transfer leftover campaign funds
4 from one campaign committee to another, and does not limit the use of pre-Proposition 34 funds in
5 later elections, the PRA also contains a generalized “surplus funds” statute. Government Code
6 section 89519, quoted below, prohibits a candidate from using “surplus funds” in a future election and
7 places severe restrictions on the use of leftover campaign funds that become “surplus,” regardless of
8 whether they were raised before or after the effective date of Proposition 34.

9 **89519.** (a) Upon leaving any elected office, or at the end of the
10 postelection reporting period following the defeat of a candidate for
11 elective office, whichever occurs last, campaign funds raised after
12 January 1, 1989, under the control of the former candidate or elected
13 officer shall be considered surplus campaign funds and shall be disclosed
14 pursuant to Chapter 4 (commencing with Section 84100).

15 (b) Surplus campaign funds shall be used only for the following
16 purposes:

17 (1) The payment of outstanding campaign debts or elected
18 officer’s expenses.

19 (2) The repayment of contributions.

20 (3) Donations to any bona fide charitable, educational, civic,
21 religious, or similar tax-exempt, nonprofit organization, where no
22 substantial part of the proceeds will have a material financial
23 effect on the former candidate or elected officer, any member of
24 his or her immediate family, or his or her campaign treasurer.

25 (4) Contributions to a political party committee, provided the
26 campaign funds are not used to support or oppose candidates for
27 elective office. However, the campaign funds may be used by a
28 political party committee to conduct partisan voter registration,
partisan get-out-the-vote activities, and slate mailers as that term
is defined in Section 82048.3.

(5) Contributions to support or oppose any candidate for federal
office, any candidate for elective office in a state other than
California, or any ballot measure.

(6) The payment for professional services reasonably required by
the committee to assist in the performance of its administrative
functions, including payment for attorney’s fees for litigation
which arises directly out of a candidate’s or elected officer’s
activities, duties, or status as a candidate or elected officer,
including, but not limited to, an action to enjoin defamation,
defense of an action brought of a violation of state or local

1 campaign, disclosure, or election laws, and an action from an
2 election contest or recount.

3 (c) For purposes of this section, the payment for, or the reimbursement to
4 the state of, the costs of installing and monitoring an electronic security
5 system in the home or office, or both, of a candidate or elected officer
6 who has received threats to his or her physical safety shall be deemed an
7 outstanding campaign debt or elected officer's expense. . . .

8 12. As a result of Government Code section 89519, a person holding state elected
9 office can transfer any funds remaining in his or her campaign committee to another campaign
10 committee established by that same person for a future election to the same or any different office, but
11 only *before* the officeholder finishes the term of office for which the original campaign committee was
12 established. Cal. Code Regs., tit. 2, § 18951(a)(1) ("An incumbent state candidate who wishes to use
13 funds for a future election must transfer those funds to a new committee for a future election no later
14 than [the date on which the incumbent leaves the elective office for which the funds were raised]").
15 Once that date passes, the leftover campaign funds become "surplus" by operation of law and cannot
16 be transferred to a future campaign committee for the same candidate.

17 13. In 1996, SENATOR MIGDEN ran successfully for election to the California
18 State Assembly, and she won re-election in both 1998 and 2000. For both re-election campaigns, she
19 used her Re-Elect Assemblywoman Carole Migden Committee (the "Assembly Committee") to raise
20 and spend funds. At the end of December 2000, as she was about to start her final two year term in the
21 Assembly, SENATOR MIGDEN had approximately \$900,000 remaining in her Assembly Committee.
22 That amount had been raised prior to the January 2001 effective date of Proposition 34 and its
23 contribution limits, and under the terms of that ballot initiative, could be used without regard to those
24 limits in a future election.

25 14. SENATOR MIGDEN was keenly aware of the value in retaining those pre-
26 Proposition 34 funds for use in a future election. At the end of 2000, SENATOR MIGDEN was
27 contemplating running for a seat on the state Board of Equalization in 2002, and/or running for a state
28 Senate seat in 2004. She therefore instructed Roger Sanders, the volunteer treasurer of her Assembly
Committee, to take all necessary steps to ensure that she could use those pre-Proposition 34 funds for
one or both of those future elections.

1 15. At that time, Proposition 34 had just been passed by the voters and many aspects
2 of its implementation remained unclear. Based on SENATOR MIGDEN's instructions, Mr. Sanders
3 took steps he believed complied with Proposition 34 and would permit SENATOR MIGDEN to use
4 her pre-Proposition 34 funds for future elections, including moving those funds out of her Assembly
5 Committee checking account in March 2001 and into a separate, segregated certificate of deposit, and
6 when the certificate of deposit matured, into an investment account at a different bank.

7 16. The pre-Proposition 34 funds eventually were transferred into SENATOR
8 MIGDEN's 2004 COMMITTEE. Approximately \$647,000 of pre-Proposition 34 funds currently
9 remains in the 2004 COMMITTEE. SENATOR MIGDEN desires to use that \$647,000 for her
10 upcoming primary election, and thus would like to transfer those funds from the 2004 COMMITTEE
11 to the 2008 COMMITTEE.

12 17. The FPPC has taken the position that SENATOR MIGDEN cannot lawfully
13 transfer her pre-Proposition 34 funds to the 2008 COMMITTEE because they became "surplus" when
14 Senator Migden left the Assembly in December 2002. The FPPC contends that SENATOR
15 MIGDEN's movement of the funds in March 2001 into a separate segregated certificate of deposit was
16 not sufficient to meet the requirements of California Government Code section 89519 because the
17 funds continued to be reported on her Assembly Committee campaign reports after she left the
18 Assembly. The FPPC informed SENATOR MIGDEN of its position in a letter dated October 29,
19 2007.

20 18. Upon receiving the FPPC's October 29, 2007 letter, SENATOR MIGDEN
21 attempted to resolve the matter short of litigation. Unable to persuade the FPPC that she had complied
22 with section 89519, SENATOR MIGDEN reminded the FPPC that it had previously permitted a state
23 officeholder, Senator Ellen Corbett, to use her pre-Proposition 34 funds for a future election even
24 though she had not complied with the transfer deadline in the surplus funds statute. *In re Pirayou*,
25 19 FPPC Ops. 1 (2006). SENATOR MIGDEN also provided the FPPC with a citation to the
26 California Attorney General's opinion that the surplus funds statute is an unconstitutional expenditure
27 ban. 78 Ops. Cal. Atty. Gen. 266 (1995), 1995 WL 475548. On or about February 15, 2007, the FPPC
28 notified SENATOR MIGDEN that it would not change its position and that it would not allow her to

1 use the \$647,000 remaining in her 2004 COMMITTEE on her 2008 primary election. Under
2 article III, section 3.5 of the California Constitution, the FPPC is required to enforce an
3 unconstitutional statute until the statute is declared unconstitutional by an appellate court, or unless it is
4 enjoined from doing so by a trial court.

5 19. SENATOR MIGDEN is in the midst of a highly competitive race for re-
6 election. The 3rd Senate District is heavily Democratic, making the Democratic Primary election on
7 June 3, 2008 the critical race in the election cycle for the district. SENATOR MIGDEN is facing three
8 well-known challengers: current state Assemblymember Mark Leno, former state Senator Joe Nation,
9 and San Francisco Police Commissioner Joe Aliota Veronese. The race is and will be expensive and it
10 is absolutely critical that SENATOR MIGDEN be permitted to use all of her campaign funds to
11 effectively communicate with the voters of the district. If allowed to do so, SENATOR MIGDEN
12 would use her pre-Proposition 34 funds to pay for cable television, radio, mail and other paid
13 advertisements, get-out-the vote operations, and other campaign needs, all of which will cost
14 significant sums of money to adequately cover her wide-ranging Senate district. By prohibiting
15 SENATOR MIGDEN from expending her remaining pre-Proposition 34 funds on her current
16 campaign, the FPPC has severely restricted SENATOR MIGDEN's ability to communicate directly
17 with voters. Without action by this court to enjoin the FPPC from enforcing section 89519,
18 SENATOR MIGDEN will be unable to effectively communicate with voters during the June primary
19 election and her ability to secure the Democratic Party nomination at that election will be severely
20 hampered.

21 20. California Government Code section 89519 is unconstitutional on its face
22 because it arbitrarily restricts candidates' ability to transfer their excess campaign funds to a committee
23 established for a current or future election, therefore unduly burdening the exercise of their First
24 Amendment rights. *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d
25 1312, 1323 (9th Cir. 1992).

26 21. California Government Code section 89519 is unconstitutional as it is being
27 applied to SENATOR MIGDEN by the FPPC because it prevents her from using funds amassed prior
28 to the effective date of Proposition 34 in her current election race, even though others who met the

statute's arbitrary time deadline can do so, and even though the one other candidate who failed to meet the deadline was allowed to do so. The burden on SENATOR MIGDEN's First Amendment rights is direct and severe, in that SENATOR MIGDEN would use those funds to communicate with the voters in her June 2008 contested primary election.

22. Plaintiffs contend that application of section 89519 to prohibit the intra-candidate transfer sought by SENATOR MIGDEN is unconstitutional. The FPPC claims the statute is constitutional or, even if it is not, that it must enforce the statute until an appellate court declares it unconstitutional. Cal. Const., art. III, § 3.5. A true controversy exists which must be resolved by this Court.

23. Defendant FPPC plans to enforce section 89519 against plaintiffs in violation of their First Amendment rights unless enjoined from doing so by this Court. The FPPC already has ordered plaintiffs not to spend any funds the FPPC considers surplus, which has had a chilling effect on the political speech of plaintiffs, who face sanctions if they spend funds in defiance of the FPPC. The FPPC's threat to enforce section 89519 against plaintiffs is real and imminent, and if not enjoined by this Court, will continue to cause irreparable harm to plaintiffs' First Amendment rights. There is therefore an actual case and controversy before this Court.

24. Plaintiffs have suffered and will continue to suffer irreparable injury as a result of defendants' conduct. Plaintiffs have no plain, speedy or adequate remedy at law.

25. The PRA permits any person to bring an action against the FPPC and those cases are expedited if they involve an upcoming election, as is the case here. Cal. Gov't Code §§ 83120, 83121.

FIRST CAUSE OF ACTION

(First and Fourteenth Amendments to the United States Constitution)

26. Plaintiffs incorporate by reference paragraphs 1 through 25 above.

27. California Government Code section 89519, as detailed above, is unconstitutional on its face because it prohibits candidates who fail to meet its time deadlines from expending campaign funds on campaign activities, in violation of plaintiffs' rights of free speech guaranteed by the First and Fourteenth Amendments to the United States Constitution.

1 **SECOND CAUSE OF ACTION**

2 **(First and Fourteenth Amendments to the United States Constitution)**

3 28. Plaintiffs incorporate by reference paragraphs 1 through 27 above.

4 29. California Government Code section 89519, as detailed above, is
5 unconstitutional as applied to plaintiffs because it prohibits plaintiffs from expending campaign funds
6 on their current campaign activities while others who amassed campaign funds prior to the effective
7 date of Proposition 34 are allowed to spend those funds on current or future elections, even if they did
8 not comply with the time deadlines in the statute.

9 **THIRD CAUSE OF ACTION**

10 **(Violation of 42 U.S.C. § 1983)**

11 30. Plaintiffs incorporate by reference paragraphs 1 through 29 above.

12 31. The aforesaid actions of defendants in enforcing Government Code
13 section 89519 to prohibit intra-candidate transfers of surplus funds and in particular to prohibit
14 plaintiffs' transfer of surplus funds was, is and will be undertaken under color of statutes, regulations,
15 customs and usages of the state of California within the meaning of 42 U.S.C. § 1983, and will deprive
16 plaintiffs of the rights, privileges and immunities secured to them by the Constitution and laws,
17 including but not limited to their rights to speak, to associate, to spend campaign funds, and to
18 participate fully and equally in the political process.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, plaintiffs pray that this Court:

21 1. Grant plaintiffs a declaratory judgment that Government Code section 89519
22 violates the First and Fourteenth Amendments to the United States Constitution.

23 2. Grant plaintiffs a preliminary and permanent injunction against enforcement of
24 Government Code section 89519.

25 3. Award plaintiffs their costs herein.

26 4. Award plaintiffs their reasonable attorneys' fees.

27 5. Grant plaintiffs such further and additional relief as the Court may deem just and
28 proper.

1 Dated: March 3, 2008

Respectfully submitted,

2 JAMES C. HARRISON
3 THOMAS A. WILLIS
4 KAREN GETMAN
5 REMCHO, JOHANSEN & PURCELL, LLP

6 By: _____/s/
James C. Harrison

7 Attorneys for Plaintiffs

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